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Attorneys for Defendants
Welch Foods Inc., A Cooperative, and
The Promotion In Motion Companies, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

DARREN CLEVENGER on behalf of himself and all others similarly situated,

Plaintiff,

v.

WELCH FOODS INC., A COOPERATIVE, THE PROMOTION IN MOTION COMPANIES, INC., a Delaware corporation and DOES 1 through 25, inclusive;

Defendants.

CASE NO. 2:20-cv-8799

DEFENDANTS' WELCH FOODS INC., A COOPERATIVE, AND THE PROMOTION IN MOTION COMPANIES, INC.'S NOTICE OF REMOVAL

[Orange County Superior Court Case No. 30-2020-01145532-CU-BT-CXC]

Action Filed: June 29, 2020
First Amended Complaint Served: August 28, 2020
Removed: September 24, 2020

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**
2 **PLEASE TAKE NOTICE** that, Defendants Welch Foods Inc., A
3 Cooperative ("Welch's"), and The Promotion In Motion Companies, Inc. ("PIM"
4 and collectively with Welch's, "Defendants") hereby remove the above-captioned
5 case pending in the Superior Court of the State of California, for the County of
6 Orange, as Case No. 30-2020-01145532-CU-BT-CXC. This putative class action
7 is properly removed pursuant to the Class Action Fairness Act ("CAFA"), as: (1)
8 the putative class size exceeds 100 persons; (2) there is "minimal diversity between
9 plaintiffs and defendants; and (3) the amount in controversy exceeds $5,000,000.
10 The grounds for removal are as follows:
11 1. CAFA grants district courts original jurisdiction over civil class action
12 lawsuits filed under Federal or State law in which any member of a class of
13 plaintiffs is a citizen of a State different from any defendant; the number of
14 members of all proposed plaintiff classes in the aggregate is over 100; and where
15 the matter in controversy exceeds the sum or value of $5,000,000, exclusive of
16 interests and costs. 28 U.S.C. § 1332(d). CAFA authorizes removal of such
17 actions under 28 U.S.C. § 1446.
18 2. This action is properly removed to the United States District Court for
19 the Central District of California because this matter was filed in the Superior
20 Court of the State of California for the County of Orange, which lies within this
21 District and Division. *See* 28 U.S.C. § 84(c)(3).
22 **PROCEDURAL BACKGROUND**
23 3. On June 29, 2020, Plaintiff filed the above captioned action in the
24 Superior Court of the State of California, County of Orange, under Case No. 30-
25 2020-01145532-CU-BT-CXC. The original complaint named only defendant
26 Welch's. The original Complaint alleged claims against Welch's under the
27 California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*. (the
28 "UCL") and the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750,

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1 *et seq*. (the "CLRA") on behalf of a putative class based on Welch's purported use
2 of packaging containing non-functional slack fill to sell its Welch's® Reduced
3 Sugar Fruit Snacks ("Reduced Sugar") and Fruit 'n Yogurt™ Snacks ("Fruit 'n
4 Yogurt"). *See* Compl. *generally*.

5 4. Welch's was served with the original Complaint on July 2, 2020. *See*
6 Declaration of Daniel S. Silverman ("Silverman Decl.") ¶ 4.

7 5. Before Welch's deadline to respond to the original Complaint expired,
8 Plaintiff filed a First Amended Complaint ("FAC") on August 25, 2020, which
9 added PIM as a defendant. Plaintiff also added additional products to the
10 Complaint in addition to Reduced Sugar and Fruit n' Yogurt, specifically adding
11 claims relating to 90 count boxes of Welch's® Fruit Snacks sold at Costco stores
12 (the "Costco Fruit Snacks" and with Reduced Sugar and Fruit n' Yogurt the
13 "Products"), but asserting the same causes of action under the UCL and CLRA, on
14 behalf of a putative class.

15 6. Welch's and PIM were served with the FAC via a Notice and
16 Acknowledgment of Receipt on August 28, 2020. *See* Silverman Decl. ¶ 5.

17 **THE REMOVAL IS TIMELY**

18 7. 28 U.S.C. § 1446(b) identifies two initial 30-day windows for
19 removal: (1) where the complaint's removability is clear from the face of the
20 pleading; and (2) where the initial pleading does not reveal a basis for removal but
21 the defendant "receives an amended pleading, motion, or other paper from which it
22 can be ascertained from the face of the document that removal is proper."
23 *Gallegos v. Costco Wholesale Corp.*, 2020 U.S. Dist. LEXIS 96911, at *5 (C.D.
24 Cal. June 2, 2020).

25 8. This removal is timely because the FAC revealed facts indicating for
26 the first time that the action was removable. Specifically, Plaintiff's addition of the
27 Costco Fruit Snacks as products upon which his claims are based reveal that the
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action is subject to removal because the amount in controversy exceeds $5,000,000. *See* Declaration of Scott Yales ("Yales Decl.") ¶ 5.

9. The removal is, thus, timely because this removal is being filed within 30 days of Defendants being served with the FAC. *See* Silverman Decl. ¶ 5.

CAFA'S MINIMAL DIVERSITY OF CITIZENSHIP REQUIREMENT IS SATISFIED

10. This Court has original jurisdiction over the action under CAFA because it is a civil class action in which at least one member of the proposed putative class of plaintiffs is a citizen of a state different from any defendant. *See* 28 U.SC. § 1332(d)(2)(A).

11. The FAC establishes that there is minimal diversity of citizenship between the class and Defendants under CAFA. *See id.* A class need not be certified before a court may assert federal jurisdiction over the action under CAFA. *See* 28 U.S.C. § 1332(d)(8).

12. Specifically, and by the allegations of the FAC, Plaintiff Darren Clevenger is an individual residing in Orange County, California, while Welch's is a cooperative corporation incorporated in Michigan with its principal place of business in Massachusetts and PIM is a corporation incorporated in Delaware with its principal place of business in New Jersey. *See* FAC ¶¶ 3-5; *see also Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("a corporation is a citizen only of (1) the state where its principal place of business is located, and (2) the state in which it is incorporated.") Because Plaintiff himself is diverse from both Defendants and purports to also represent a class of California consumers, minimal diversity is satisfied.[1]

[1] Although the FAC fictitiously names Doe defendants, their citizenship is disregarded for purposes of determining whether minimal diversity is satisfied. *See* 28 U.S.C. § 1441(b)(1).

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CAFA'S CLASS SIZE REQUIREMENTS ARE SATISFIED

13. CAFA grants district courts original jurisdiction over civil class action lawsuits filed under federal or state law in which members of all proposed plaintiff classes in the aggregate is over 100. 28 U.S.C. § 1332(d).

14. Plaintiff's FAC alleges a putative class comprised of himself and all similarly situated consumers who made retail purchases of the Products from June 30, 2016 to present.

15. From June 30, 2016 to present, far more than 100 consumers have made retail purchases of the Products. *See* Yales Decl. ¶ 5.

16. CAFA's class size requirement is, thus, satisfied.

CAFA'S AMOUNT IN CONTROVERSY REQUIREMENT IS SATISFIED

17. CAFA authorizes the removal of class action cases in which the amount in controversy for all class members exceeds $5,000,000. 28 U.S.C. § 1332(d).

18. Plaintiff has not alleged a specific amount in controversy in the FAC. However, the failure of the FAC to specify the total amount of monetary relief sought by Plaintiff does not deprive this Court of jurisdiction. *Banta v. Am. Med. Response Inc.,* No. CV 11-03586 GAF (RZx), 2011 U.S. Dist. LEXIS 77558, at * 3 (C.D. Cal. Jul. 15, 2011) (observing that even where a pleading is indefinite on its face, a defendant can possess "sufficient information allowing it to ascertain that the amount in controversy exceeds the jurisdiction minimum" and thus may remove the action on that basis).

19. To remove a class action pursuant to CAFA, the removing party merely needs to file a "short and plain statement of the grounds of removal." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 83 (2014). The court must accept the removing party's amount in controversy allegation as long as the allegation is made in good faith. *Id*. at 87. The removing party's notice of removal

only needs to include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. *Id*. at 89.

20. In considering whether the amount in controversy exceeds $5,000,000, the Court must "look beyond the complaint to determine whether the putative class action meets the [amount in controversy] requirements" adding "the potential claims of the absent class members" and attorneys' fees. *Rodriguez*, 728 F.3d at 981 (*citing Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345 (2013)); *Guglielmino v. McKee Foods Corp*., 506 F.3d 696, 705 (9th Cir. 2007).

21. Furthermore, "[i]n considering whether the amount in controversy is clear from the face of the complaint, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint." *Altamirano v. Shaw Indus., Inc*., C-13-0939 EMC, 2013 WL 2950600, at *4 (N.D. Cal. June 14, 2013) (*citing Korn v. Polo Ralph Lauren Corp*., 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008)); *see also Muniz*, 2007 WL 1302504, at *3.

22. Here, Plaintiff seeks, on behalf of himself and the putative class: "restitution and/or disgorgement" under the UCL, "damages" under the CLRA, attorneys' fees and costs of suit. *See* FAC at 14 (prayer for relief).

23. Since June 30, 2016, sales of the Products have far exceeded $5,000,000. *See* Yales Decl. ¶ 5. Therefore, the amount in controversy, based on restitution alone, far exceeds $5,000,000. *See id*.

24. It is, thus, apparent that the combination of restitution and/or disgorgement and actual damages sought will satisfy the $5,000,000 threshold for CAFA removal, especially once attorney's fees are also taken into consideration. *See id*.

THE OTHER REQUIREMENTS FOR REMOVAL ARE SATISFIED

25. Consent of other parties is not required for removal under CAFA's class action jurisdiction. *See* 28 U.S.C. § 1453(b). Additionally, there are no

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parties other than Plaintiff and the proposed class and removing Defendants.

26. Defendants are filing herewith true and correct copies of the state court filings with which it has been served, including copies of all process, pleadings, and orders. *See* Silverman Decl. Exs. 1-14 (Exhibit 1 (Complaint); Exhibit 2 (Civil Case Cover Sheet); Exhibit 3 (Summons); Exhibit 4 (Notice of Case Assignment); Exhibit 5 (Proof of Service of Summons of Complaint); Exhibit 6 (Proof of Service of Personal Service of Summons of Complaint); Exhibit 7 (Minute Order); Exhibit 8 (Clerk's Certificate of Mailing); Exhibit 9 (First Amended Complaint); Exhibit 10 (Summons); Exhibit 11 (Notice of Appearance); Exhibit 12 (Proposed Order Granting Stipulation to Continue CMC); Exhibit 13 (Stipulation to Continue Case Management Conference); Exhibit 14 (Order Granting Stipulation to Continue Case Management Conference)).

27. Pursuant to 28 U.S.C. § 1446(d), Defendants are filing with the clerk of the Superior Court of the State of California for the County of Orange, and serving upon plaintiff, a Notice to Adverse Party and State Court of Removal of Action to Federal Court. Proof of same will be filed with this Court. *See* Silverman Decl., Ex. 15.

28. No previous application has been made for the relief requested herein.

29. This Notice of Removal has been signed pursuant to Fed. R. Civ. P. 11.

30. Defendants reserve the right to amend or supplement this Notice of Removal.

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1 Accordingly, Defendants respectfully request that this action be removed to
2 this Court.
3
4 Dated: September 24, 2020

VENABLE LLP
Daniel S. Silverman
Bryan J. Weintrop

By: /s/ Daniel S. Silverman
Daniel S. Silverman

Attorneys for Defendants,
Welch Foods Inc., A Cooperative, and
The Promotion In Motion Companies,
Inc.

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EXHIBIT 1

Electronically Filed by Superior Court of California, County of Orange, 06/29/2020 05:33:41 PM.
30-2020-01145532-CU-BT-CXC - ROA # 2 - DAVID H. YAMASAKI, Clerk of the Court By Georgina Ramirez, Deputy Clerk.

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DARREN CLEVENGER AND THE CLASS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DARREN CLEVENGER on behalf of himself and all others similarly situated,

Plaintiff,

v.

WELCH FOODS INC., A COOPERATIVE, and DOES 1 through 25, inclusive,

Defendants.

CASE NO.: 30-2020-01145532-CU-BT-CXC

CLASS ACTION COMPLAINT FOR:

1. **Violation of Cal. Unfair Competition, Cal. Business & Professions Code §17200, *et seq.***
2. **Violation of Cal. Consumers Legal Remedies Act, Cal. Civil Code §1750, et seq.;**

Assigned for All Purposes
Judge William Claster

CX-104

1 Plaintiff Darren Clevenger ("Plaintiff"), by and through his attorneys, DiVincenzo
2 Schoenfield Stein and Lanza & Smith, PLC, brings this class action complaint on behalf of himself
3 and all others similarly situated (the "Class"), alleging facts related to his own purchases based on
4 personal knowledge and other facts based upon the investigation of counsel.

5 **NATURE OF THE ACTION**

6 1. This is a consumer protection class action arising from Welch Foods Inc., A
7 Cooperative ("Defendant") engaging in the practice of "slack-filling" boxes of its Welch's®
8 Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks. The practice of using oversized
9 containers with substantial, nonfunctional, empty space inside them is called "slack-fill" and is
10 illegal under California and Federal law. Both Federal and California laws have long prohibited
11 nonfunctional slack-fills for food containers. Although the legislative and administrative basis and
12 policies behind the law are based, in part, on findings that this practice leads consumers to believe
13 they are receiving a greater quantity of the food than is in the package (even if the quantity or weight
14 is accurately displayed on the label), Plaintiff's claims are based solely on the grounds that
15 Defendant's conduct is unlawful and unfair. Plaintiff does **not** assert any claims based on
16 misrepresentation.

17 2. Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n Yogurt™ boxes
18 contain eight pouches of snacks, compared to ten pouches in other flavors of Welch's® Fruit Snacks.
19 The boxes Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n Yogurt™ Snacks
20 contain a significant amount of nonfunctional slack-fill compared to other flavors of Welch's® Fruit
21 Snacks. In those boxes, Welch's® includes two more identically sized pouches and 33% more
22 content by volume. By violating Federal and California slack-fill laws, Defendant's products are
23 deemed "misbranded" and cannot legally be sold in interstate commerce. Defendant's abuses of state
24 and federal laws violate the unlawful and unfair prongs of California's Unfair Competition Law (Bus
25 & Prof. Code §17200, *et seq*.) ("UCL"), for which Plaintiff asserts claims for unlawful and unfair
26 practices only; he does *not* assert claims for deceptive or fraudulent practices under the UCL.
27 Defendant's conduct also violates California's Consumer Legal Remedies Act, Section 1750 of the
28 Cal. Civil Code, *et seq* ("CLRA").

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PARTIES

3. Plaintiff is, and at all relevant times was, an adult residing in Orange County, California. Clevenger purchased Defendant's Welch's® Fruit Snacks for some time from various stores, including but not limited to, Walmart and Albertson's in Orange County, California. Clevenger noticed that the Welch's® Fruit Snacks with Reduced Sugar contained significant amounts of empty space. Specifically, he realized that Welch's® boxes of Fruit Snacks with Reduced Sugar contained two less pouches per box than other non-premium varieties of Welch's® Fruit Snacks ("Regular Welch's® Fruit Snacks"). He also noticed that Welch's® Fruit 'n Yogurt™ Snacks he had purchased also only contained eight pouches despite the box being the exact same size as Regular Welch's® Fruit Snacks boxes with ten pouches. Clevenger suffered injury in fact as a result of Defendant's conduct because the boxes were illegally slack-filled -- containing at least two less pouches of snacks than they should have but for the illegal slack-fill. Therefore, the products were misbranded and could not legally be sold.

4. Defendant Welch Foods Inc. is a cooperative based and headquartered in Concord, Massachusetts, and incorporated in Michigan. Welch's products include grape juices, jams, fruit snacks, and jellies, which are sold internationally.

5. In addition to the Defendant named in this action, upon information and belief, there are other parties, known and unknown, who participated in the conduct as alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as DOES 1 through 25, inclusive, are presently unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Each of these fictitiously named defendants is responsible for the events and occurrences alleged herein which were legally and proximately cause by their conduct. Plaintiff will seek leave to amend this pleading to state the true names and capacities of such fictitiously names defendants if ascertained.

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JURISDICTION AND VENUE

6. This action is brought pursuant to the CLRA, Civil Code §1750, et seq., and California's UCL, Business and Professions Code §17200, et seq., and seeks equitable relief, including restitution, plus monetary recovery.

7. The Superior Court has Personal jurisdiction over Defendant pursuant to Cal. Code of Civil Procedure §410.10 because at all times relevant to this complaint, it conducted significant, continuous business in California. Based on information and belief, Defendant has marketed and sold millions of dollars of food goods to California residents for their consumption.

8. Venue is proper in this county under Business and Professions Code §17203 and Code of Civil Procedure §§395(a) and 395.5. Defendant transacts business and receives substantial compensation from sales in Orange County. Defendant intentionally distributed its products for sale to consumers in Orange County. Plaintiff resides in Orange County and purchased Defendant's products in Orange County.

FACTUAL ALLEGATIONS

9. Welch's® Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks were packaged in boxes that were substantially under-filled and contained a substantial amount of unnecessary empty space, *i.e.* non-functional slack-fill. This is apparent because Defendant only included eight pouches of snacks in these flavors, but included ten pouches in identically sized boxes of other flavors. The boxes with ten pouches have a net weight of 9 oz, whereas the box with eight pouches have a net weight of 6.4 oz. As such, the eight pouch boxes are at least 20% under-filled by quantity and at least 30% under-filled by weight.

10. Defendant's Fruit Snacks and Fruit 'n Yogurt™ Snacks are individually plastic wrapped and packaged in colored cardboard boxes. Consumers cannot see the empty space contained in the product packaging, *i.e.* the non-functional slack-fill. These boxes are substantially under-filled and contain substantial amount of unnecessary space, i.e. non-functional slack-fill.

11. Both federal and California law prohibit nonfunctional slack-fill for food containers, which would include fruit snacks and its packaging. As explained below, California has codified the federal law and regulations.

12. **The Slack-Fill Violates Federal Law.** Federal statutes and regulations prohibit nonfunctional slack fill. Pursuant to the Federal Food Drug and Cosmetic Act, 21 U.S.C. §403(d) and 21 C.F.R. §100.100 provides:

> "In accordance with Section 403(d) of the [Food Drug and Cosmetic Act], a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.
>
> (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:
>
> (1) Protection of the contents of the package;
>
> (2) The requirements of the machines used for enclosing the contents in such package;
>
> (3) Unavoidable product settling during shipping and handling:
>
> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;
>
> (5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or a durable commemorative or promotional packages; or
>
> (6) Inability to increase the level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

13. The FDA deems a product containing nonfunctional slack fill to be "misbranded" within the meaning of the Food Drug and Cosmetic Act. As such, the sale of the packages of Defendant's boxes with only eight pouches is prohibited under 21 U.S.C. §331.

14. **The Slack-Fill Also Violates California Law.** California law expressly prohibits nonfunctional slack-fill. California has adopted the federal regulations and codified them as the California "Fair Packaging and Labeling Act" ("FPLA"). Bus & Prof Code §12606, et seq. The FPLA states that it "applies to food containers subject to Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)) and Section 100.100 of Title 21 of the Code of Federal Regulations." Bus & Prof. Code §12606.2(a). The FPLA uses identical language, as is relevant here, to 21 CFR §100.100. Bus & Prof Code §12606.2(b) and (c)(1)-(6). The text of FPLA contains additional provisions which, based on the express language of the statute, are inoperative.[1]

15. The boxes of Welch's® Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks do not meet any of the six exemptions under federal or California law.

16. Defendant's slack-fill does not protect the content of the packages. The Fruit Snacks and Fruit 'n Yogurt™ Snacks each individually plastic wrapped, and do not gain additional protection from the extra space in the box compared to the boxes with ten pouches. See 21 CFR §100.100(a)(1); Cal. Bus & Prof. Code § 12606.2(a)(1).

17. The requirements of packaging machines do not justify or require the slack-fill. Defendant's boxes are sealed with hot glue. As such, upon information and belief, the equipment used to manufacture and seal the boxes does not breach the inside of boxes during the packaging process. The hot glue is applied to an exterior flap of the box which is then sealed by a second exterior flap that is folded down onto the glued surface. Neither the hot glue nor the sealing

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[1] Bus & Prof Code §§12606.2(c)(7)-(8) add additional requirements and exemptions which are not included in the 21 C.F.R. 100.100 or otherwise imposed under 21 U.S.C. §343(d). As such, pursuant to Bus & Prof Code §§12606.2(e) and (f) they are inoperative. To wit, Bus & Prof. §12606.2(f) states "If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose, those federal requirements are incorporated into this section and shall apply as if they were set forth in this section."

equipment requires a substantial amount of slack-fill in the box during the manufacturing and packaging processes. See 21 CFR §100.100(a)(2); Cal. Bus & Prof. Code § 12606.2(a)(2).

18. The slack-fill is not caused by product settling during shipping and handling. Given the product's density, shape, and composition, any settling occurs immediately at the point of filling the box. No additional product settling occurs during subsequent shipping and handling (see 21 CFR §100.100(a)(3); Cal. Bus & Prof. Code § 12606.2(a)(3)).

19. The slack-fill space is not needed to perform a specific function, such as preparing the food. The Fruit Snacks and Fruit 'n Yogurt™ Snacks are removed from the packing for consumption (e.g., the Fruit Snacks are not consumed or prepared in the cardboard packing). See 21 CFR §100.100(a)(4); Cal. Bus & Prof. Code § 12606.2(a)(4).

20. Defendant's packaging itself lacks independent value from the food it contains. The cardboard packaging is not a commemorative item nor is it a reusable container which is part of the presentation of the food, nor is it intended for use after the food is consumed. See 21 CFR §100.100(a)(5); Cal. Bus & Prof. Code § 12606.2(a)(5).

21. The slack-filled package was not necessary to prevent pilfering or accommodate required food labeling. Indeed, Defendant is able to include ten pouches of its product in each box. Alternatively, Defendant could reduce the size of the containers to eliminate the nonfunctional slack-fill. See 21 CFR §100.100(a)(6); Cal. Bus & Prof. Code § 12606.2(a)(6).

22. There is no lawful reason for the substantial non-functional slack-fill contained in Defendant's packaging of its Reduced Sugar Fruit Snacks or its Fruit 'n Yogurt™ Snacks. Defendant is overcharging reasonable consumers because its packaging is substantially larger than necessary to contain the eight pouches included per box.

CLASS ALLEGATIONS

23. Plaintiff brings count I (the UCL Cause of Action) as a class action pursuant to California Code of Civil Procedure §382 on behalf of a Class consisting of:

> All persons who made retail purchases in the State of California of Welch's® Reduced Sugar Fruit Snacks,Welch's® Fruit 'n Yogurt™ Snacks, or any other Welch's brand fruit snacks containing less pouches per box than the Regular Welch's® Fruit Snacks sold in the same size box. The class period will be from June 30, 2016, through the date a class is certified.

Excluded from the Class are the officers, directors, or employees of Defendant; any entity in which Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of Defendant. Also excluded from the Class are the judge to whom this case is assigned and any member of the judge's immediate family.

24. The Class is so numerous that joinder of all members is impracticable. Plaintiff believes the class consists of, at least, many thousands of members. As a result, individual joinder of all purchasers is impractical.

25. Plaintiff's claims are typical of the claims of the other members of the Class, as Plaintiff and all other members of the Class sustained injuries arising out of Defendant's conduct as alleged herein. The slack-filled containers were the same for all members of the class. Further, Plaintiff is a member of the Class he seeks to represent.

26. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in complex class action litigation. Plaintiff has no interests that are contrary to, or in conflict with, those of the other members of the Class. Plaintiff and counsel are committed to the vigorous prosecution of this action on behalf of all Class members.

27. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

a) Whether Defendant's packing of Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks or other Fruit Snacks contained non-functional slack-fill in violation of California Business and Professions Code §12606.2 (FPLA), *et seq.*;

b) Whether packages of Defendant's Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks or other Fruit Snacks contained non-functional slack-fill in violation of 21 U.S.C. §403(d) *et seq.* and 21 C.F.R. 100.100;

c) The number of Fruit Snack pouches (of all varieties) that could or should be contained in Defendant's packaging;

d) Whether Defendant's packages were misbranded and prohibited from being sold in interstate commerce under 21 U.S.C. §331;

e) Whether Defendant's conduct is an unfair business practice within the meaning of California Business and Professions Code §17200, *et seq.*;

f) Whether Defendant's conduct is an unlawful business practice within the meaning of California Business and Professions Code §17200, *et seq.*;

g) The appropriate measure of restitution and/or other relief; and

h) Whether Defendant should be enjoined from continuing its unlawful practices.

28. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy.

29. Defendant has acted on grounds generally applicable to the entire Class, thereby making final relief appropriate with respect to the Class as a whole. Prosecution of separate actions by individual members of the Class could create the risk of inconsistent or varying adjudications with respect to individual members of the Class that could establish incompatible standards of conduct for Defendant.

30. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Further, the amount at stake for many of the Class members is small, meaning that few, if any, Class members could afford to maintain individual suits against Defendant. The expense and burden of individual litigation would make it impracticable or impossible for the Class to prosecute their claims individually.

31. Without a class action, Defendant will likely retain the benefit of their wrongdoing and could continue a course of action, which would result in further damages to the Class. Plaintiff envisions no difficulty in the management of this action as a class action.

FIRST CAUSE OF ACTION
For Violation of California Unfair Competition Law, Cal. Business & Professions Code §17200, *et seq (*UCL)

32. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth herein.

33. At all relevant times, the UCL was in full force and effect.

1 34. The UCL prohibits the use of "any unlawful, unfair or fraudulent business act or
2 practice." (Bus & Prof. Code §17200).
3 35. Section 17203 of the UCL empowers the Court to enjoin any conduct that violates the
4 UCL and "make such orders or judgments, including the appointment of a receiver, as may be
5 necessary to prevent the use or employment by any person of any practice which constitutes unfair
6 competition, as defined in this chapter, or as may be necessary to restore to any person in interest
7 any money or property, real or personal, which may have been acquired by means of such unfair
8 competition."
9 36. Plaintiff has "suffered injury in fact and has lost money or property as a result of the
10 unfair competition" as complained of herein. Bus & Prof. Code §17204. Plaintiff has paid money for
11 Defendant's products that contained nonfunctional slack-fill and were "misbranded." As such, the
12 products could not legally be sold in interstate commerce. The monies that Plaintiff and the class
13 members paid for the products resulted from unfair and illegal competition by Defendant and
14 Plaintiff and the class members are entitled to an order restoring those monies to them and an order
15 enjoining Defendant from selling nonfunctionally slack-filled products in the State of California.
16 Additionally, even if Defendant's Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks and
17 other Fruit Snacks could have legally been sold in interstate commerce, Plaintiff overpaid and/or
18 acquired less than he would have if the same packages had not contained nonfunctional slack-fill.
19 37. Defendant's conduct violated the unlawful prong of the UCL, as it violated the
20 California FPLA and the Federal Food Drug and Cosmetic Act (and regulations promulgated
21 thereunder), both of which prohibit nonfunctional slack-fill. Further, by violating the federal slack-
22 fill regulations, Defendant's products are deemed "misbranded" and, thus, illegal to sell. 21 U.S.C.
23 §331. It is not necessary for Plaintiff to establish that Defendant violated both laws. A violation of
24 either law establishes a violation of the UCL.
25 38. Defendant's conduct also violated the unfair practices prong of the UCL. Defendant's
26 conduct violates both California and federal public policy, as shown by their respective prohibitions
27 on nonfunctional slack-fill and prohibition on introducing misbranded products into interstate
28 commerce. The conduct is also anti-competitive and puts competitors who follow the law at a

disadvantage. Defendant's conduct suppresses competition and has a negative impact on the marketplace, decreasing consumer choice. Further, Defendant's conduct causes significant aggregate harm to consumers, causing them to overpay, because the increased empty space in the packages is nonfunctional slack-fill.

39. Defendant's violations of the UCL entitle Plaintiff and the class members to seek injunctive relief, including, but not limited to ordering Defendant to permanently cease their illegal conduct and provide full restitution to Plaintiff and the class members.

SECOND CAUSE OF ACTION
For Violation of California Consumers Legal Remedies Act,
California Civil Code §1750, *et seq.* (CLRA)

40. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth herein.

41. The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices." Civil Code § 1770(a)(5) prohibits conduct which is unfair or unlawful because a person represents that goods have "characteristics" or "quantities" that they do not have. By including the nonfunctional slack-fill in violation of California and Federal law, as described above, Defendant has committed unfair and unlawful acts, practices, and methods of competition in violation of the CLRA.

42. Plaintiff brings this cause of action pursuant to Civil Code §1750, *et seq.*, the CLRA, on his own behalf and on behalf of all other persons similarly situated pursuant to Cal. Civil Code §§1781(a) & (b).

43. The CLRA provides its own class certification standards, which makes class certification mandatory where the requirements are met. Section 1781 provides:

> (b) the Court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:
>
> (1) It is impracticable to bring all members of the class before the court.

> (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
>
> (3) The claims or defenses of the representative plaintiff is typical of the claims or defenses of the class.
>
> (4) The representative plaintiff will fairly and adequately protect the interests of the class

44. For the reasons stated in paragraphs 3 to 31, all of the requirements of California Civil Code §1781(b) are met. Plaintiff seeks certification of a CLRA class defined as stated above in paragraph 23, except the beginning date will be June 30, 2017 (rather than 2016).

45. Plaintiff and the proposed class members have each been harmed by Defendant's violations of the CLRA in that he and class members have paid for products that were packaged to contain significant nonfunctional slack-fill. Therefore, Plaintiff and the class members have overpaid and/or been short-changed due to the unlawful packaging.

46. Pursuant to California Civil Code §1780(a), Plaintiff, on behalf of himself and the class, seeks: (i) and order enjoining Defendant's wrongful conduct; (ii) an order of restitution; (iii) any and all other relief the Court deems proper. Plaintiff reserves the right to amend this complaint to also seek actual damages, as permitted under Civil Code §§1780(a)(1) and 1782(e), after he has met the demand requirements under Civil Code §1782(a), if Defendant fails to fully cure.

PRAYER FOR RELIEF

Wherefore, Plaintiff, on behalf of himself and the putative Class members, prays for the following relief:

A. For an order certifying this case as a class action under California Code of Civil Procedure §382 (UCL), and California Civil Code § 1781 (CLRA), as alleged herein, and appointing Plaintiff as a Class Representative and Plaintiff's Counsel as Lead Class Counsel;

B. For an order that Defendant has violated the statutes as alleged herein;

C. For preliminary, permanent and mandatory injunctive relief prohibiting Defendant, its officers, agents and those acting in concert with them, from committing in the future those violations of law herein alleged;

D. For an order awarding Plaintiff and Class members restitution and/or disgorgement in

1 an amount to be determined at trial;

2 E. For an award of reasonable attorneys' fees and all costs of suit as provided for by
3 California Code of Civil Procedure § 1780(e), California Code of Civil Procedure § 1021.5, and/or
4 all other applicable law and/or equitable doctrines;

5 F. For such other relief as the Court deems just and proper.

6
7 DIVINCENZO SCHOENFIELD STEIN
and LANZA & SMITH, PLC

8
9 Dated: June 29, 2020

By: */s/ Anthony Lanza*
10 Anthony Lanza
Robert J. Stein III
11 Ramin T. Montakab
Attorneys for Plaintiff
12 DAREN CLEVENGER,
AND THE CLASS

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EXHIBIT 9

Electronically Filed by Superior Court of California, County of Orange, 08/25/2020 02:26:00 PM.
30-2020-01145532-CU-BT-CXC - ROA # 17 - DAVID H. YAMASAKI, Clerk of the Court By Sarah Loose, Deputy Clerk.

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Attorneys for Plaintiff
DARREN CLEVENGER AND THE PUTATIVE CLASS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DARREN CLEVENGER on behalf of himself and all others similarly situated;

Plaintiff,

v.

WELCH FOODS INC., A COOPERATIVE; THE PROMOTION IN MOTION COMPANIES, INC., a Delaware corporation; and DOES 1 through 25, inclusive;

Defendants.

CASE NO.: 30-2020-01145532-CU-BT-CXC

Honorable William Claster
Department CX-104
Complaint Filed: June 29, 2020

FIRST AMENDED CLASS ACTION COMPLAINT FOR:

1. **Violation of Cal. Unfair Competition, Cal. Business & Professions Code §17200, *et seq.***
2. **Violation of Cal. Consumers Legal Remedies Act, Cal. Civil Code §1750, et seq.;**

1 Plaintiff Darren Clevenger ("Plaintiff"), by and through his attorneys, DiVincenzo
2 Schoenfield Stein and Lanza & Smith, PLC, brings this class action complaint on behalf of himself
3 and all others similarly situated (the "Class"), alleging facts related to his own purchases based on
4 personal knowledge and other facts based upon the investigation of counsel.

5 **NATURE OF THE ACTION**

6 1. This is a consumer protection class action arising from Defendants' practice of
7 "slack-filling" boxes of their Welch's® Reduced Sugar Fruit Snacks, Fruit 'n Yogurt™ Snacks, and
8 certain boxes of Welch's® Fruit Snacks. The practice of using oversized containers with substantial,
9 nonfunctional, empty space inside them is called "slack-fill" and is illegal under California and
10 Federal law. Both Federal and California laws have long prohibited nonfunctional slack-fills for food
11 containers. Although the legislative and administrative basis and policies behind the law are based,
12 in part, on findings that this practice leads consumers to believe they are receiving a greater quantity
13 of the food than is in the package (even if the quantity or weight is accurately displayed on the
14 label), Plaintiff's claims are based solely on the grounds that Defendants' conduct is unlawful and
15 unfair. Plaintiff does **not** assert any claims based on misrepresentation.

16 2. Welch's® Fruit Snacks with Reduced Sugar and Welch's® Fruit 'n Yogurt™ boxes
17 contain eight pouches of snacks, compared to ten pouches in the same size boxes of other flavors of
18 Welch's® Fruit Snacks. The boxes of Welch's® Fruit Snacks with Reduced Sugar and Welch's®
19 Fruit 'n Yogurt™ Snacks thus contain a significant amount of nonfunctional slack-fill compared to
20 other flavors of Welch's® Fruit Snacks. In those boxes, Welch's® includes two more identically
21 sized pouches and 33% more content by volume. Additionally, Defendants manufacture and package
22 Welch's® Fruit Snacks for sale at Costco (the "Costco Fruit Snacks") in a box containing 90
23 packages, but the box can hold, at least, 110 packages – i.e., at least 22% more content, meaning this
24 package is also slack-filled. By violating Federal and California slack-fill laws, Defendants' products
25 are deemed "misbranded" and cannot legally be sold in interstate commerce. Defendants' abuses of
26 state and federal laws violate the unlawful and unfair prongs of California's Unfair Competition Law
27 (Bus & Prof. Code §17200, *et seq*.) ("UCL"), for which Plaintiff asserts claims for unlawful and
28 unfair practices only; he does *not* assert claims for deceptive or fraudulent practices under the UCL.

Defendants' conduct also violates California's Consumer Legal Remedies Act, Section 1750 of the Cal. Civil Code, *et seq* ("CLRA").

PARTIES

3. Plaintiff is, and at all relevant times was, an adult residing in Orange County, California. Clevenger purchased Defendant's Welch's® Fruit Snacks for some time from various stores, including but not limited to, Walmart and Albertson's in Orange County, California. Clevenger noticed that the Welch's® Fruit Snacks with Reduced Sugar contained significant amounts of empty space. Specifically, he realized that Welch's® boxes of Fruit Snacks with Reduced Sugar contained two less pouches per box than other non-premium varieties of Welch's® Fruit Snacks ("Regular Fruit Snacks"). He also noticed that Welch's® Fruit 'n Yogurt™ Snacks he had purchased also only contained eight pouches despite the box being the exact same size as Regular Fruit Snacks boxes with ten pouches. Clevenger suffered injury in fact as a result of Defendants' conduct because the boxes were illegally slack-filled -- containing at least two less pouches of snacks than they should have but for the illegal slack-fill. Therefore, the products were misbranded and could not legally be sold.

4. Defendant Welch Foods Inc. is a cooperative based and headquartered in Concord, Massachusetts, and incorporated in Michigan. Welch's products include grape juices, jams, fruit snacks, and jellies, which are sold internationally.

5. Defendant The Promotion in Motion Companies, Inc., "(PMI") is a Delaware corporation with its headquarters in Allendale, New Jersey. Plaintiff alleges, based on information and belief, that PMI makes, markets, and/or distributes the subject products under a license agreement with Welch Foods. Plaintiff alleges, based on information and belief, that PMI participates in the making, marketing, and distribution of the subject products for Welch Foods, whereby Welch Foods and PMI jointly control and share responsibility for the manufacture, branding, marketing, and/or distribution of the subject products. At all relevant times the subject packaging is and was subject to approval by Welch.

6. In addition to the Defendants named in this action, upon information and belief, there are other parties, known and unknown, who participated in the conduct as alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as DOES 1 through 25, inclusive, are presently unknown to Plaintiff, who therefore sues said defendants by such fictitious names. Each of these fictitiously named defendants is responsible for the events and occurrences alleged herein which were legally and proximately cause by their conduct. Plaintiff will seek leave to amend this pleading to state the true names and capacities of such fictitiously names defendants if ascertained.

JURISDICTION AND VENUE

7. This action was initially filed on June 29, 2020, this action is brought pursuant to the CLRA, Civil Code §1750, et seq., and California's UCL, Business and Professions Code §17200, et seq., and seeks equitable relief, including restitution, plus monetary recovery.

8. The Superior Court has Personal jurisdiction over Defendants pursuant to Cal. Code of Civil Procedure §410.10 because at all times relevant to this complaint, they conducted significant, continuous business in California. Based on information and belief, Defendants have marketed and sold at least a million of dollars of food goods to California residents for their consumption.

9. Venue is proper in this county under Business and Professions Code §17203 and Code of Civil Procedure §§395(a) and 395.5. Defendants transact business and receive substantial compensation from sales in Orange County. Defendants intentionally distributed their products for sale to consumers in Orange County. Plaintiff resides in Orange County and purchased Defendants' products in Orange County.

FACTUAL ALLEGATIONS

10. Welch's® Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks were packaged in boxes that were substantially under-filled and contained a substantial amount of unnecessary empty space, *i.e.* non-functional slack-fill. This is apparent because Defendants only included eight

pouches of snacks in these flavors, but included ten pouches in identically sized boxes of other flavors. The boxes with ten pouches have a net weight of 9 oz, whereas the box with eight pouches have a net weight of 6.4 oz. As such, the eight pouch boxes are at least 20% under-filled by quantity and at least 30% under-filled by weight.

11. Defendants' Fruit Snacks and Fruit 'n Yogurt™ Snacks are individually plastic wrapped and packaged in colored cardboard boxes. Consumers cannot see the empty space contained in the product packaging, *i.e.* the non-functional slack-fill. These boxes are substantially under-filled and contain substantial amount of unnecessary space, i.e. non-functional slack-fill.

12. Additionally, Welch's® Fruit Snacks sold at Costco are sold in a cardboard box containing 90 pouches with significant empty space. The box can hold, at least, 110 pouches.

13. Both federal and California law prohibit nonfunctional slack-fill for food containers, which would include fruit snacks and its packaging. As explained below, California has codified the federal law and regulations.

14. **The Slack-Fill Violates Federal Law.** Federal statutes and regulations prohibit nonfunctional slack fill. Pursuant to the Federal Food Drug and Cosmetic Act, 21 U.S.C. §403(d) and 21 C.F.R. §100.100 provides:

> "In accordance with Section 403(d) of the [Food Drug and Cosmetic Act], a food shall be deemed to be misbranded if its container is so made, formed, or filled as to be misleading.
>
> (a) A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack-fill. Slack-fill is the difference between the actual capacity of a container and the volume of product contained therein. Nonfunctional slack-fill is the empty space in a package that is filled to less than its capacity for reasons other than:
>
> (1) Protection of the contents of the package;
>
> (2) The requirements of the machines used for enclosing the contents in such package;
>
> (3) Unavoidable product settling during shipping and handling:
>
> (4) The need for the package to perform a specific function (e.g., where packaging plays a role in the preparation or consumption of a food), where such function is inherent to the nature of the food and is clearly communicated to consumers;

(5) The fact that the product consists of a food packaged in a reusable container where the container is part of the presentation of the food and has value which is both significant in proportion to the value of the product and independent of its function to hold the food, e.g., a gift product consisting of a food or foods combined with a container that is intended for further use after the food is consumed; or a durable commemorative or promotional packages; or

(6) Inability to increase the level of fill or to further reduce the size of the package (e.g., where some minimum package size is necessary to accommodate required food labeling (excluding any vignettes or other nonmandatory designs or label information), discourage pilfering, facilitate handling, or accommodate tamper-resistant devices).

15. The FDA deems a product containing nonfunctional slack fill to be "misbranded" within the meaning of the Food Drug and Cosmetic Act. As such, the sale of the packages of Defendants' boxes with only eight pouches is prohibited under 21 U.S.C. §331.

16. **The Slack-Fill Also Violates California Law.** California law expressly prohibits nonfunctional slack-fill. California has adopted the federal regulations and codified them as the California "Fair Packaging and Labeling Act" ("FPLA"). Bus & Prof Code §12606, et seq. The FPLA states that it "applies to food containers subject to Section 403(d) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)) and Section 100.100 of Title 21 of the Code of Federal Regulations." Bus & Prof. Code §12606.2(a). The FPLA uses identical language, as is relevant here, to 21 CFR §100.100. Bus & Prof Code §12606.2(b) and (c)(1)-(6). The text of FPLA contains additional provisions which, based on the express language of the statute, are inoperative.[1]

17. The boxes of Welch's® Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks and Costco boxes of Welch's® Fruit Snacks do not meet any of the six exemptions under federal or California law.

[1] Bus & Prof Code §§12606.2(c)(7)-(8) add additional requirements and exemptions which are not included in the 21 C.F.R. 100.100 or otherwise imposed under 21 U.S.C. §343(d). As such, pursuant to Bus & Prof Code §§12606.2(e) and (f) they are inoperative. To wit, Bus & Prof. §12606.2(f) states "If the requirements of this section do not impose the same requirements as are imposed by Section 403(d) of the Federal Food Drug and Cosmetic Act (21 U.S.C. Sec. 343(d)), or any regulation promulgated pursuant thereto, then this section is not operative to the extent that it is not identical to the federal requirements, and for this purpose, those federal requirements are incorporated into this section and shall apply as if they were set forth in this section."

18. Defendants' slack-fill does not protect the content of the packages. The Fruit Snacks and Fruit 'n Yogurt™ Snacks each individually plastic wrapped, and do not gain additional protection from the extra space in the box compared to the boxes with ten pouches. See 21 CFR §100.100(a)(1); Cal. Bus & Prof. Code § 12606.2(a)(1).

19. The requirements of packaging machines do not justify or require the slack-fill. Defendants' boxes are sealed with hot glue. As such, upon information and belief, the equipment used to manufacture and seal the boxes does not breach the inside of boxes during the packaging process. The hot glue is applied to an exterior flap of the box which is then sealed by a second exterior flap that is folded down onto the glued surface. Neither the hot glue nor the sealing equipment requires a substantial amount of slack-fill in the box during the manufacturing and packaging processes. See 21 CFR §100.100(a)(2); Cal. Bus & Prof. Code § 12606.2(a)(2).

20. The slack-fill is not caused by product settling during shipping and handling. Given the product's density, shape, and composition, any settling occurs immediately at the point of filling the box. No additional product settling occurs during subsequent shipping and handling (see 21 CFR §100.100(a)(3); Cal. Bus & Prof. Code § 12606.2(a)(3)).

21. The slack-fill space is not needed to perform a specific function, such as preparing the food. The Fruit Snacks and Fruit 'n Yogurt™ Snacks are removed from the packing for consumption (e.g., the Fruit Snacks are not consumed nor prepared in the cardboard packing). See 21 CFR §100.100(a)(4); Cal. Bus & Prof. Code § 12606.2(a)(4).

22. Defendants' packaging itself lacks independent value from the food it contains. The cardboard packaging is not a commemorative item nor is it a reusable container which is part of the presentation of the food, nor is it intended for use after the food is consumed. See 21 CFR §100.100(a)(5); Cal. Bus & Prof. Code § 12606.2(a)(5).

23. The slack-filled package was not necessary to prevent pilfering or accommodate required food labeling. Indeed, Defendants are able to include at least ten pouches of its product in each box that is the same size as the Reduced Sugar and Fruit 'n Yogurt™ snacks containing only eight pouches. Alternatively, Defendants could reduce the size of the containers to eliminate the nonfunctional slack-fill. See 21 CFR §100.100(a)(6); Cal. Bus & Prof. Code § 12606.2(a)(6).

24. There is no lawful reason for the substantial non-functional slack-fill contained in Defendants' packaging of its Reduced Sugar Fruit Snacks, Fruit 'n Yogurt™ Snacks and the Costco Fruit Snacks. Defendants are overcharging reasonable consumers because the packaging is substantially larger than necessary to contain the eight pouches included per box.

25. Based on information and belief, Plaintiff alleges that PMI designs the packaging which is then subject to Welch's approval before it can be placed into the stream of commerce. Further, Welch's retains extensive power and control over the marketing and sale of Welch's fruit snacks. Despite being on notice that such products are sold in violation of state and federal law, Welch's has not demanded a recall or taken other action to correct or ameliorate the wrongful conduct, but instead continues to allow and profit from the sale of the slack-filled products.

CLASS ALLEGATIONS

26. Plaintiff brings count I (the UCL Cause of Action) as a class action pursuant to California Code of Civil Procedure §382 on behalf of a Class consisting of:

> All persons who made retail purchases in the State of California of Welch's® Reduced Sugar Fruit Snacks, Welch's® Fruit 'n Yogurt™ Snacks, or any other Welch's brand fruit snacks containing less pouches per box than the Regular Fruit Snacks sold in the same size box or the Costco Fruit Snacks sold in the same size box. The class period will be from June 30, 2016, through the date a class is certified.
>
> Excluded from the Class are the officers, directors, or employees of Defendant; any entity in which Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of Defendant. Also excluded from the Class are the judge to whom this case is assigned and any member of the judge's immediate family.

27. The Class is so numerous that joinder of all members is impracticable. Plaintiff believes the class consists of, at least, many thousands of members. As a result, individual joinder of all purchasers is impractical.

28. Plaintiff's claims are typical of the claims of the other members of the Class, as Plaintiff and all other members of the Class sustained injuries arising out of Defendants' conduct as alleged herein. The slack-filled containers were the same for all members of the class. Further, Plaintiff is a member of the Class he seeks to represent.

1 29. Plaintiff will fairly and adequately protect the interests of the members of the Class
2 and has retained counsel competent and experienced in complex class action litigation. Plaintiff has
3 no interests that are contrary to, or in conflict with, those of the other members of the Class. Plaintiff
4 and counsel are committed to the vigorous prosecution of this action on behalf of all Class members.
5 30. Common questions of law and fact exist as to all members of the Class and
6 predominate over any questions affecting solely individual members of the Class. Among the
7 questions of law and fact common to the Class are:

8 a) Whether Defendants' packing of Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™
9 Snacks or other Fruit Snacks contained non-functional slack-fill in violation of California Business and Professions Code §12606.2 (FPLA), *et seq.*;

10 b) Whether packages of Defendants' Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™
11 Snacks or other Fruit Snacks contained non-functional slack-fill in violation of 21 U.S.C. §403(d) *et seq.* and 21 C.F.R. 100.100;

12 c) The number of Fruit Snack pouches (of all varieties) that could or should be
13 contained in Defendants' packaging;

14 d) Whether Defendants' packages were misbranded and prohibited from being sold in interstate commerce under 21 U.S.C. §331;

15 e) Whether Defendants' conduct is an unfair business practice within the meaning of
16 California Business and Professions Code §17200, *et seq.*;

17 f) Whether Defendants' conduct is an unlawful business practice within the meaning of California Business and Professions Code §17200, *et seq.*;

18 g) Whether, and to what extent, Defendant Welch approved of the packaging and/or had
19 the ability to require that the packaging not be sack-filled and/or require recall or other corrective action;

20 h) The appropriate measure of restitution and/or other relief; and

21 i) Whether Defendants should be enjoined from continuing their unlawful practices.

22
23 31. Class action treatment is superior to the alternatives for the fair and efficient
24 adjudication of the controversy alleged herein. Such treatment will permit a large number of
25 similarly situated persons to prosecute their common claims in a single forum simultaneously,
26 efficiently, and without the duplication of effort and expense that numerous individual actions would
27 entail. No difficulties are likely to be encountered in the management of this class action that would
28

preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy.

32. Defendants acted on grounds generally applicable to the entire Class, thereby making final relief appropriate with respect to the Class as a whole. Prosecution of separate actions by individual members of the Class could create the risk of inconsistent or varying adjudications with respect to individual members of the Class that could establish incompatible standards of conduct for Defendants.

33. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Further, the amount at stake for many of the Class members is small, meaning that few, if any, Class members could afford to maintain individual suits against Defendants. The expense and burden of individual litigation would make it impracticable or impossible for the Class to prosecute their claims individually.

34. Without a class action, Defendants will likely retain the benefit of their wrongdoing and could continue a course of action, which would result in further damages to the Class. Plaintiff envisions no difficulty in the management of this action as a class action.

FIRST CAUSE OF ACTION
For Violation of California Unfair Competition Law,
Cal. Business & Professions Code §17200, *et seq (*UCL)

35. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth herein.

36. At all relevant times, the UCL was in full force and effect.

37. The UCL prohibits the use of "any unlawful, unfair or fraudulent business act or practice." (Bus & Prof. Code §17200).

38. Section 17203 of the UCL empowers the Court to enjoin any conduct that violates the UCL and "make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest

any money or property, real or personal, which may have been acquired by means of such unfair competition."

39. Plaintiff has "suffered injury in fact and has lost money or property as a result of the unfair competition" as complained of herein. Bus & Prof. Code §17204. Plaintiff has paid money for Defendants' products that contained nonfunctional slack-fill and were "misbranded." As such, the products could not legally be sold in interstate commerce. The monies that Plaintiff and the class members paid for the products resulted from unfair and illegal competition by Defendants and Plaintiff and the class members are entitled to an order restoring those monies to them and an order enjoining Defendants from selling nonfunctionally slack-filled products in the State of California. Additionally, even if Defendants' Reduced Sugar Fruit Snacks and Fruit 'n Yogurt™ Snacks and other Fruit Snacks could have legally been sold in interstate commerce, Plaintiff overpaid and/or acquired less than he would have if the same packages had not contained nonfunctional slack-fill.

40. Defendants' conduct violated the unlawful prong of the UCL, as it violated the California FPLA and the Federal Food Drug and Cosmetic Act (and regulations promulgated thereunder), both of which prohibit nonfunctional slack-fill. Further, by violating the federal slack-fill regulations, Defendants' products are deemed "misbranded" and, thus, illegal to sell. 21 U.S.C. §331. It is not necessary for Plaintiff to establish that Defendants violated both laws. A violation of either law establishes a violation of the UCL.

41. Defendants' conduct also violated the unfair practices prong of the UCL. Defendants' conduct violates both California and federal public policy, as shown by their respective prohibitions on nonfunctional slack-fill and prohibition on introducing misbranded products into interstate commerce. The conduct is also anti-competitive and puts competitors who follow the law at a disadvantage. Defendants' conduct suppresses competition and has a negative impact on the marketplace, decreasing consumer choice. Further, Defendants' conduct causes significant aggregate harm to consumers, causing them to overpay, because the increased empty space in the packages is nonfunctional slack-fill.

42. Defendants' violations of the UCL entitle Plaintiff and the class members to seek injunctive relief, including, but not limited to ordering Defendants to permanently cease their illegal conduct and provide full restitution to Plaintiff and the class members.

SECOND CAUSE OF ACTION
For Violation of California Consumers Legal Remedies Act,
California Civil Code §1750, *et seq.* (CLRA)

43. Plaintiff realleges the foregoing paragraphs and incorporates them as if fully set forth herein.

44. The CLRA prohibits certain "unfair methods of competition and unfair or deceptive acts or practices." Civil Code § 1770(a)(5) prohibits conduct which is unfair or unlawful because a person represents that goods have "characteristics" or "quantities" that they do not have. By including the nonfunctional slack-fill in violation of California and Federal law, as described above, Defendants committed unfair and unlawful acts, practices, and methods of competition in violation of the CLRA.

45. Plaintiff brings this cause of action pursuant to Civil Code §1750, *et seq.*, the CLRA, on his own behalf and on behalf of all other persons similarly situated pursuant to Cal. Civil Code §§1781(a) & (b).

46. The CLRA provides its own class certification standards, which makes class certification mandatory where the requirements are met. Section 1781 provides:

> (b) the Court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:
>
> (1) It is impracticable to bring all members of the class before the court.
>
> (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
>
> (3) The claims or defenses of the representative plaintiff is typical of the claims or defenses of the class.
>
> (4) The representative plaintiff will fairly and adequately protect the interests of the class

47. For the reasons stated in paragraphs 3 thru 31 above, all of the requirements of California Civil Code §1781(b) are met. Plaintiff seeks certification of a CLRA class defined as stated above in paragraph 26, except the beginning date will be June 30, 2017 (rather than 2016).

48. Plaintiff and the proposed class members have each been harmed by Defendants' violations of the CLRA in that he and class members have paid for products that were packaged to contain significant nonfunctional slack-fill. Therefore, Plaintiff and the class members have overpaid and/or been short-changed due to the unlawful packaging.

49. On July 1 and July 15, 2020, counsel for Plaintiff sent demand letters via US Certified Mail, return receipt requested, to Welch Foods and PMI, respectively, demanding compliance with Section 1782 of the California Civil Code (the CLRA), consisting of refunds for the subject products, in addition to ceasing all unlawful conduct asserted in this litigation, and attaching a copy of the complaint filed on June 29, 2020. Defendants failed to comply with the demand letters within the 30 day deadline specified therein, and, as such, pursuant to Sections 1780 and 1782(e) of the California Civil Code, Plaintiff is thereby entitled to pursue damages under the CLRA at this time.

50. Pursuant to California Civil Code §1780(a), Plaintiff, on behalf of himself and the class, seeks: (i) and order enjoining Defendant's wrongful conduct; (ii) an order of restitution; (iii) damages; and (iv) any and all other relief the Court deems proper.

PRAYER FOR RELIEF

Wherefore, Plaintiff, on behalf of himself and the putative Class members, prays for the following relief:

A. For an order certifying this case as a class action under California Code of Civil Procedure §382 (UCL), and California Civil Code § 1781 (CLRA), as alleged herein, and appointing Plaintiff as a Class Representative and Plaintiff's Counsel as Lead Class Counsel;

B. For an order that Defendants have violated the statutes as alleged herein;

C. For preliminary, permanent and mandatory injunctive relief prohibiting Defendants, their officers, agents and those acting in concert with them, from committing in the future those

violations of law herein alleged;

D. For an order awarding Plaintiff and Class members restitution and/or disgorgement under the UCL and damages under the CLRA in an amount to be determined at trial;

E. For an award of reasonable attorneys' fees and all costs of suit as provided for by California Code of Civil Procedure § 1780(e), California Code of Civil Procedure § 1021.5, and/or all other applicable law and/or equitable doctrines;

F. For such other relief as the Court deems just and proper.

DIVINCENZO SCHOENFIELD STEIN
and LANZA & SMITH, PLC

Dated: August 25, 2020

By: *<u>/s/ Anthony Lanza</u>*
Anthony Lanza
Robert J. Stein III
Ramin T. Montakab
Attorneys for Plaintiff
DAREN CLEVENGER,
AND THE CLASS

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: Class Action: Welch's Reduced Sugar, Fruit 'n Yogurt Fruit Snacks Boxes Filled with 'Significant Empty Space'